

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANNA VERBSKY SAGAMI and  
DESIGN-A-WAY PUBLICATIONS LLC,

Plaintiff,

v.

PALMER MARKETING ENT, LLC and  
CENTER COURT DIRECT, INC.,

Defendant.

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OPINION AND ORDER

10-cv-152-slc

Before the court is the motion of plaintiffs Anna Sagami and Design-A-Way Publications, LLC for an order finding defendants in contempt of the preliminary injunction entered in this case on April 10, 2010. Dkt. 63. Because I find that plaintiffs have failed to make a prima facie showing that defendants violated an unambiguous command of the order, I am denying plaintiffs' motion.

Solely for the purpose of deciding this motion, I find the following facts:

FACTS

Plaintiff Anna Sagami is a jewelry designer and sole member of plaintiff Design-A-Way Publications, LLC. Sagami holds a registered copyright for a 22-piece collection of jewelry known as the Design-A-Way collection. Since 2005, Sagami has sold her collection through her exclusive licensee, plaintiff Design-A-Way, LLC, displaying pieces from the collection on cream colored, magnetic-backed picture frames with crystal embellishments.

On March 26, 2010, plaintiffs filed this suit for copyright and trade dress infringement, alleging that defendants Center Court Direct, Inc. and Palmer Marketing ENT, LLC were

marketing and selling a copycat line of jewelry known as “Clique” and displaying them on picture-frame displays that appeared nearly identical to those used by plaintiffs.

On April 23, 2010, pursuant to the parties’ stipulation, the court entered a preliminary injunction against defendant Center Court. Here are the provisions relevant to plaintiffs’ contempt motion:

3. Center Court agrees that Center Court, its officers, agents, servants, employees, attorneys and persons in active concert or participation with Center Court and its officers, agents, servants, employees, and attorneys (“Center Court Parties”) will be bound by this Preliminary Injunction.

4. Center Court agrees and obligates itself to provide actual notice of any Preliminary Injunction to the Center Court Parties to the extent necessary to abide by the terms contained in ¶¶ 5 and 6 of this stipulation.

5. Center Court agrees that this Court may enter a Preliminary Injunction prohibiting the Center Court Parties from further manufacture, sale, or distribution of a jewelry collection sold by Center Court under the name “Clique” during the pendency of this lawsuit or until further order of the Court, including any and all portions of that collection, derivative works based on that collection, and designs substantially similar to that collection regardless of name.

6. Center Court further agrees that this Preliminary Injunction shall also prohibit further use by the Center Court Parties of a trade dress consisting of cream colored frames with crystal embellishments with jewelry products displayed and/or arranged on magnetic backing during the pendency of this lawsuit or until further order of the Court.

On August 2, 2011, plaintiffs filed a motion pursuant to Fed. R. Civ. P. 65, seeking to hold defendants “and any other persons acting in concert or participation with Defendants” in contempt of the preliminary injunction. Dkt. 63. In support of their motion, plaintiff Sagami submitted two affidavits, one by herself and one by a private investigator, indicating that:

1) various gift stores in Illinois are continuing to sell the infringing Clique bracelets or a virtually identical version and are continuing to display them on cream-colored, magnetic display frames or on black magnetic frames; and

2) a representation agency called “Imagine That!” is continuing to market the Clique bracelets in the Houston and Galveston area.

*See* dkts. 65 and 69.

Neither defendant owns, operates or controls “Imagine That!” or any of the retail stores identified in plaintiffs’ submissions. There is no evidence of communications between the defendants and these retail stores. Defendants have not promoted, marketed or sold Clique-brand bracelets or frame displays to anyone since March 22, 2010, approximately one month before the injunction was entered.

## OPINION

Generally, civil contempt “is remedial, and for the benefit of the complainant,” while criminal contempt “is punitive, to vindicate the authority of the court.” *Federal Trade Comm’n v. Trudeau*, 579 F.3d 754, 769 (7th Cir. 2009) (internal quotations omitted). Civil contempt sanctions must either compensate the complainant for losses caused by the contemptuous conduct or be designed to coerce the contemnor’s compliance with a court order. *Id.* A coercive sanction must afford the contemnor an opportunity to “purge” his or her contempt, meaning that the contemnor can avoid punishment by complying with the court order. *Id.*

To sustain their contempt claim, plaintiffs have the burden of proving these four elements by clear and convincing evidence:

(1) the preliminary injunction sets forth an unambiguous command;

(2) the alleged contemnor violated that command;

(3) the alleged contemnor's violation was significant, meaning it did not substantially comply with the injunction; and

(4) the alleged contemnor failed to take steps to reasonably and diligently comply with the injunction.

*Prima Tek II, L.L.C. v. Klerk's Plastic Industries, B.V.*, 525 F.3d 533, 542 (7<sup>th</sup> Cir. 2008). Federal Rule of Civil Procedure 65(d)(2) provides that

The [*injunction*] order binds only the following who receive actual notice of it by personal service or otherwise;

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys;  
and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

This third clause has been interpreted to mean that a non-party can be brought within the scope of an injunction and held in contempt only when that third party aids or abet a party's violation of the injunction or is in privity with an enjoined party. *Blockowicz v. Williams*, 630 F.3d 563, 567 (7<sup>th</sup> Cir. 2010); *Nat'l Spiritual Assembly v. Nat'l Spiritual Assembly*, 628 F.3d 837, 848 (7<sup>th</sup> Cir. 2010).

In their brief in support of their contempt motion, plaintiffs assert that Center Court has violated the preliminary injunction by "continu[ing] to sell and distribute the infringing 'Clique' bracelets on cream colored crystal embellished magnetic frames and in some instances on black magnetic frames." Dkt. 64, at 1. Plaintiffs hop to this conclusion from the fact that various retailers continue to offer the Clique bracelets for sale and to display them using plaintiffs' trade

dress. However, Center Court's owner firmly denies that Center Court manufactured, sold or distributed Clique-brand bracelets or frame displays to anyone after March 22, 2010. (Palmer's president also has averred that Palmer has not marketed the bracelets or frame displays since well before the date the injunction was entered.) Defendants insist that any Clique-brand bracelets or allegedly-infringing frame displays sold or used at the retail level is "leftover inventory" purchased before the injunction was entered.

This factual record does not sufficiently support a finding of contempt. Absent evidence showing that the retailers purchased the Clique bracelets they had on display from Center Court after the injunction was entered, or somehow are "in active concert or participation with Center Court," the fact that third-party retailers continue to sell Clique bracelets does not mean that defendants violated the preliminary injunction. Contrary to plaintiffs' contention, the preliminary injunction to which the parties stipulated does not require Center Court or Palmer to recall the allegedly-infringing bracelets or frame displays that they already had sold and it does not require them to announce the injunction to downstream retailers who already had purchased the bracelets. Perhaps these are requirements that plaintiffs wanted in the stipulated injunction (or in hindsight wish they had included), but this is not what they got. All the injunction did was prohibit the "Center Court Parties," namely, Center Court and its officers, agents, servants, employees, and attorneys, from further manufacture, sale, or distribution of the Clique line of jewelry or the cream-colored frame displays. Plaintiffs have not a shred of evidence indicating that Center Court has not obeyed these terms.

The only evidence to which plaintiffs point to show that the third party retailers are not acting independently is an affidavit from their investigator, Daniel Schroeder, who observed the

Clique bracelets on display on plain black magnetic picture frames at two different stores in Illinois. Dkt. 65m ¶¶ 28, 35. According to Schroeder, he asked the cashiers working at these stores when the display had changed from the cream-colored display to the black display; each cashier told him that the display had changed “a few months ago.” From this, plaintiffs seem to assume that Center Court must have directed these display changes, and that it did so around the time the injunction was entered. On these sparse facts, plaintiffs’ assumptions are speculative. Although it is possible that Center Court contacted these two retailers and asked them to stop using the cream-colored display frame, this is no more likely than the retailers making this change on their own, either because of this lawsuit or for independent reasons. Absent evidence as to who changed the retail displays and why, plaintiffs have not sufficiently established that the directive came from Center Court, much less that the retailers were aiding or abetting Center Court’s violation of the injunction. At most, plaintiffs have shown that various nonparty retailers are ignoring the injunction against Center Court, and even this assumes that these retailers are aware of the injunction in the first place.

This is not enough to bind these parties to the injunction or find them in contempt. *Blockowicz*, 630 F.3d at 563 (internet website host could not be compelled to remove defamatory material from its website pursuant to permanent injunction issued in defamation action to which it was not a party absent evidence that host took any affirmative action to aid or abet defamers in violating injunction after issuance). *See also Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945) (“The courts . . . may not grant . . . an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.”)

Perhaps recognizing the weakness of their position, plaintiffs changed it in their reply, in which they accuse Center Court of violating the injunction by selling a redesigned version of the Clique bracelets that nonetheless still infringes plaintiffs' copyright. Specifically, plaintiff Sagami asserts that upon visiting certain retail stores, she observed that approximately half of the Center Court magnetic bracelets being sold were a redesigned bracelet in which Center Court simply removed a crystal bead from the allegedly-infringing Clique bracelet and replaced it with a small oval bead, but otherwise retained all of the original design's bead and construction features.

As with their first argument, plaintiffs' evidence does not meet their heavy burden of persuasion on their contempt motion. First, they have submitted no proof that the newly-designed bracelets Sagami observed were manufactured by Center Court. Sagami *says* they were Center Court bracelets, but she does not say how she knows this. Further, even if the bracelets were manufactured by Center Court, plaintiffs have failed to submit clear and convincing evidence that the bracelets were manufactured or sold after the injunction was entered in this case. The mere fact that Sagami did not observe such bracelets for sale during her "periodic" pre-injunction visits to these stores is simply not enough to support an inference that these bracelets had to have been made or sold after the injunction was entered.

Accordingly, plaintiffs' motion for contempt will be denied.

I note that in their reply, plaintiffs ask in the alternative that the court stay any ruling on the contempt motion and grant them permission to take further discovery from Center Court regarding its "design and sale of the redesigned magnetic bracelet." Dkt. 75, at 5. This request is denied. Although the discovery cut-off is not until November 11, 2011, it is far too late in

this case for the parties to engage in discovery on a product that is not the subject of the complaint. As noted in previous orders, this case has been plagued by delays, some of which the court has tolerated and some which it has not. Based on what has happened so far, I have no hesitation concluding that to allow discovery on a new product this late in this lawsuit would cause additional delays and would divert the parties from preparing for their December 12, 2011 trial. If plaintiffs have a reasonable basis for believing that Center Court has designed and sold another bracelet that infringes plaintiffs' copyright, then they may file a new lawsuit.<sup>1</sup>

#### ORDER

IT IS ORDERED that plaintiffs' motion for a finding of contempt is DENIED.

Entered this 13<sup>th</sup> day of September, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge

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<sup>1</sup> Even if plaintiffs could show that the bracelets Sagami observed were manufactured or sold by Center Court after entry of the injunction, the record in this case is not developed sufficiently to allow the court to rule on plaintiffs' contempt claim. Because the parties stipulated to the injunction, this court has made no findings concerning the features of the Clique bracelets specified in the complaint, or whether they infringe on plaintiffs' copyright. Given the procedural posture of this case, as well as the other factors noted above, it would be more fair and efficient to evaluate plaintiffs' allegations concerning the allegedly re-designed bracelet in the context of a new trial rather than a contempt proceeding. *See TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 881 (Fed. Cir. 2011) (court has broad discretion to determine how to enforce its injunctive decrees).